92-202

No. _____

IN THE

Supreme Court of the United States

October Term, 1992

RANDOLPH CENTRAL SCHOOL DISTRICT,
Petitioner,

vs.

CORA ALDRICH,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether in an action brought under the Equal Pay Act, 29 U.S.C. §206(d), a school district or other municipal defendant satisfies its burden on the affirmative defense of a disparity in pay resulting from "a differential based on any other factor other than sex" by submitting uncontested evidence that the difference is based on a civil service classification system and a competitive examination?

II. Whether the Equal Pay Act's "disparity caused by any other factor other than sex" defense requires that an employer prove that the factor is "business related"?

III. Whether the Equal Pay Act's "disparity caused by any other factor other than sex" defense requires that an employer prove that the factor is related to the requirements of the particular position of employment?

LIST OF PARTIES

The parties to the proceedings below were petitioner Randolph Central School District, which was a defendant and appellee; the Cattaraugus County Civil Service Commission, which is not a petitioner in this Court, and which also was a defendant and appellee; and the respondent Cora Aldrich, who was the plaintiff and appellant.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Randolph Central School District respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on May 5, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 963 F.2d 520, and is reprinted in the appendix hereto, p. 1a, *infra*.

The decision and order of the United States District Court for the Western District of New York (Arcara, *D.J.*), has not been published. It is reprinted in the appendix hereto, p. 22a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §§1331, 1337, and 1343, respondent brought this suit against petitioner and The Cattaraugus County Civil Service Commission (the "Commission") in the Western District of New York alleging violations of the Equal Pay Act, 29 U.S.C. §206(d) and Section 706 of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq.* ("Title VII"). On May 8, 1991, the District Court granted motions for summary judgment by petitioner and by the Commission dismissing all of respondent's claims. See p. 36a, *infra*.

On respondent's appeal, the Second Circuit on May 5, 1992 entered a judgment and decision affirming the Western District's dismissal of respondent's Title VII claims, and reversing the Western District's dismissal of respondent's claims under the Equal Pay Act. See pp. 1a-21a, *infra*. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1251(1).

STATUTE INVOLVED

29 U.S.C. §206(d). *Prohibition of Sex Discrimination*

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

STATEMENT OF THE CASE

Respondent, who is employed as a cleaner by the petitioner Randolph Central School District ("petitioner or Randolph"), filed this action in October 1988 against petitioner and the Cattaraugus County Civil Service Commission ("Commission"), pursuant to the Equal Pay Act, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 et seq. ["Title VII"]. She alleged that as a cleaner she is paid less than male custodians solely because of her sex.[1] Randolph answered the complaint and denied the allegations of discrimination. It also raised numerous affirmative defenses, including (1) that any differential in the payment of wages between male and female employees was due to factors other than sex pursuant to 29 U.S.C. §206(d)(1)(IV); (2) that respondent's rate of pay is governed by the labor agreement in effect between Randolph and the Randolph Central School Service Staff Association; and (3) that respondent had never achieved a rating on the Civil Service exam which would qualify her for a permanent appointment as a custodian under Section 61 of the New York Civil Service Law.

Following the completion of discovery, Randolph and the Commission moved for summary judgment pursuant to Fed.R.Civ.P. 56(b) on the ground that Ms. Aldrich could not establish essential elements of her claim and, therefore, they were entitled to judgment as a matter of law.

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[1] She also alleged that by denying her a single opportunity to work overtime on August 30, 1985, Randolph was retaliating against her for filing a complaint with the New York State Division of Human Rights ["NYSDHR"] and the Equal Employment Opportunity Commission.

The District Court's Decision

The district court, in a decision and order dated May 7, 1991 (appendix at pp. 22a-36a), dismissed all of respondent's claims. The district court's statement of facts, which was not directly questioned by the appeals court, reads as follows:

> "The plaintiff was hired as a part-time cleaner by Randolph in February, 1982. In September, 1982, plaintiff, at her request, was given a position as a full-time cleaner. Randolph employs numerous civil service employees, including cleaners and custodians. The Commission is responsible for making job classification determinations pursuant to New York's Civil Service Law and local civil service rules and regulations. Its job descriptions are utilized by Randolph.
>
> The cleaner position is a labor class position. *See* N.Y. Civ. Serv. L. §43. In other words, when filling the cleaner position, Randolph may hire anyone it believes can learn to perform the duties of a cleaner in accordance with the job description developed by the Commission.
>
> The position of custodian, on the other hand, is a competitive position. *See* N.Y. Civ. Serv. L. §44. Therefore, under the New York Civil Service Law, applicants for the custodian position must take a civil service examination. *See* N.Y. Civ. Serv. L. §50. Applicants are then ranked according to their test scores and placed on an eligibility list. Randolph may only hire custodians from among the top three applicants on the eligibility list. *See* N.Y. Civ. Serv. L. §61. As applicants are chosen to fill custodian positions, the remaining applicants move up the list. The eligibility list stays in effect for a fixed period of time. *See* N.Y. Civ. Serv. L. §56. At the end of that period, a new examination is given and a new

> eligibility list is established. Both the position of custodian and cleaner are open to both sexes and compensation for both positions is determined by the collective bargaining process. All of the custodians currently employed by Randolph have been selected pursuant to the New York Civil Service Law.
>
> The plaintiff alleges that she performs the same duties as those employed by Randolph as custodians and, therefore, she should be paid the same wage. She alleges that the only reason she is not paid the same wage as the custodians is because of her sex. It is undisputed, however, that the plaintiff took the civil service examination for the position of custodian prior to being hired as a cleaner and several times thereafter, and has never been ranked among the top three applicants on the eligibility list.
>
> There is some overlap between the duties performed by cleaners and those performed by custodians. The key difference, however, is that custodians are required to be able to perform a variety of maintenance and repair tasks which are not required of cleaners.
>
> The plaintiff first questioned her job classification as a cleaner in February, 1983. She later contested the classification by filing a grievance on or about May 2, 1983. In the grievance, she stated that she was misclassified on September 15, 1982. The grievance was denied on the merits and also on the ground that it was not timely submitted pursuant to the collective bargaining agreement. Plaintiff appealed the grievance decision to the Superintendent of Schools and then to the Board of Education but the grievance was denied at each step.
>
> The plaintiff then submitted her grievance to binding arbitration. On December 5, 1983, the arbitrator issued an Opinion and Award wherein he denied the grievance as untimely filed.

On February 2, 1984, plaintiff filed a job classification questionnaire with the Commission in order to have her actual job duties reviewed for classification purposes. The Commission reviewed her job duties and, on April 4, 1984, issued a Determination wherein it found that the cleaner classification accurately described plaintiff's duties.

On or about April 16, 1984, plaintiff filed an appeal of the Commission's Determination. A hearing was held before a panel of three members of the Commission. On June 6, 1984, the panel issued a decision finding that plaintiff was properly classified as a cleaner and directing that additional typical work activities be enumerated in a revised job description in order to more clearly describe the duties of a cleaner.

On or about February 13, 1985, plaintiff filed complaints with the NYSDHR against the defendants alleging sex discrimination on the ground that she was classified and paid as a cleaner rather than a custodian. The NYSDHR conducted an investigation and, on July 21, 1987, issued Determinations and Orders of no probable cause and dismissed the complaints.

On or about September 20, 1985, plaintiff filed another complaint with the NYSDHR wherein she alleged that Randolph retaliated against her for filing the first complaint when it did not ask her to perform overtime work on one occasion prior to the opening of school. Randolph answered the complaint by explaining that none of the cleaners were asked to work overtime that day. On July 21, 1987, the NYSDHR issued a Determination and Order of no probable cause and dismissed the retaliation complaint.

On or about July 5, 1988, the EEOC issued Determinations and Orders of "no reasonable cause" and dismissed the complaints against the defendants. Plaintiff then filed this action against the defendants on October 5, 1988."

After reciting the appropriate summary judgment standard, the district court dismissed respondent's Title VII claims, first noting that the respondent had never qualified for the position of custodian under the New York Civil Service law, and that the respondent had not presented any evidence that the civil service examination had a significantly discriminatory impact upon women. The court also dismissed the Title VII retaliation claim for faliure to come forward with proof.

On the Equal Pay Act claim, the district court held that even if it were to assume that the respondent had made out a *prima facie* case, Randolph could not be found liable "because the pay differential between cleaners and custodians is based on a factor other than sex, *i.e.*, the civil service examination." After noting that anyone hired as a custodian had been among the top three scorers on the civil service examination, and that the exam is mandated by New York law, N.Y. Civ. Serv. Law §50, and is open to both men and women, the court found that the respondent "has not challenged the legitimacy of the civil service examination or the New York Civil Service Law." Because the examination constituted a factor other than sex, and because respondent presented no evidence that the test or the system of classification used was not *bona fide*, Randolph was entitled to summary judgment dismissing the claim.

The district court undoubtedly realized that Randolph itself had no control over respondent's classification, or over the requirements, including the competitive exam, which had been established by the Civil Service Commission pursuant to New York State law. Far more than being just a legitimate business reason for a differential in pay for "any other factor other than sex," the differential was due to a *necessary* and *essential* business reason: the obligation to follow New York law.

The Second Circuit's Decision

The United States Court of Appeals for the Second Circuit, while affirming the dismissal of the Title VII claims of sex-based wage discrimination and retaliation, reversed the district court, and held that the petitioners' use of the civil service examination and classification system did not provide a defense to the Equal Pay Act claim. In doing so the court freely acknowledged that its decision was in direct conflict with the decision of the Eighth Circuit, sitting *en banc*, in *Strecker v. Grand Forks City Social Services Bd.*, 640 F.2d 96 (8th Cir. 1980), and stated its agreement with the dissenting opinion in that case.

After recounting the factual background and procedural history of this case, the Second Circuit discussed the purposes of the Equal Pay Act and the basic allocation of proof as set out in the statute and in *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-96 (1974):

> "In order to prove a violation of the EPA, a plaintiff must first establish a prima facie case of wage discrimination by demonstrating that: (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; (3) the jobs are performed under similar working conditions. Once the plaintiff makes out a prima facie case, the burden shifts to the employer to justify the wage differential by proving that the disparity results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

Opinion at 6a (citations omitted). The court then looked to the legislative history of the EPA. The court recognized that among early drafts of the legislation there had been a proposal which included six specific defenses, including one for "job classification systems," but that the bill was restructured to provide for only four affirmative defenses, and that the "job classification systems" defense was not among them. The Second Circuit also noted language in the report accompanying the bill, which stated:

> "there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a *majority* of the job classification systems. Thus, it is anticipated that a *bona fide* job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination."

Opinion at 9a.[2] The court did not discuss, or consider, what the legislators meant by a "job classification system," and, specifically, did not consider whether the discussion concerning such systems referred only to classification systems developed by an employer, or whether they included systems mandated by an entity separate from the employer. Rather, the court concluded that:

> Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue."

Opinion at 10a.

[2] *Quoting* H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963) (emphasis added), *reprinted in* 1963 U.S.C.C.A.N. 687, 688-89.

The Second Circuit went on to state that this conclusion comported with Congress' policy goals in enacting the EPA, by limiting the breadth of the factor-other-than-sex defense. Tellingly, the court stated:

> "Surely Congress did not intend that an employee would lose an EPA claim after making out a prima facie case of wage discrimination simply because, for example, the *employer* chooses to call one employee a cleaner and another employee a custodian."

Opinion at 10a (emphasis added). The Second Circuit then noted that other Federal Appeals Courts have required that a legitimate business reason support the use of the factor other than sex.[3] In this discussion the court recognized, however, that its holding was in direct conflict with the standard articulated by the Eighth Circuit. In a footnote the Second Circuit stated:

> We disagree with the Eighth Circuit which held *en banc* that an employer satisfies the burden of proving the factor-other-than-sex defense simply by showing that a job classification system operates in gender-neutral manner without any further proof that the classifications are bona fide. *Strecker v. Grand Forks City Social Services Bd.*, 640 F.2d 96, 100-03 (8th Cir. 1980), adopted *en banc*, 640 F.2d at 109 (8th Cir. 1981). Instead, we agree with Judge Heaney's dissenting opinion in that case. *Id.* at 104 ("[A] governmental unit can specify the education and experience that an employee must have, so long as the requirements are reasonably related to the job to be filled and are not used as a pretext to avoid paying women equal pay for substantially equal work.").

Opinion at 12a, note 1.

[3] The court noted the following cases: *Maxwell v. City of Tucson*, 803 F.2d 444 (CA9 1986); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (CA9 1982); *EEOC v. J.C. Penny Co.*, 843 F.2d 249 (CA6 1988). The court did not discuss cases from the Seventh Circuit. *See* discussion *infra*, at p. 11a-13a.

After discussing cases which applied the factor-other-than-sex defense under Title VII,[4] the Second Circuit held that:

> For these reasons, we hold that an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense. Additionally, we note that the plaintiff may counter the defendant's affirmative defense by offering evidence showing that the reasons sought to be proved are a pretext for sex discrimination.

The Second Circuit then applied its newly-announced standard and reversed the district court's dismissal of the Equal Pay Act claim. After determining that respondent had made out a *prima facie* case sufficient to survive summary judgment,[5] the court held that the school district had to prove that the classification system is "bona fide." Opinion at 12a.

> "Specifically, the school district must prove that the exam for custodians and the practice of filling the custodian's postion only from among the top three scorers on the exam are related to performance of the custodian's job . . . the employer can rely on an exam to justify that wage differential only if the employer proves that the exam is job-related.

After concluding that factual issues remained to be determined on this issue, the court remanded the case to the district court.

[4] The Bennett Amendment incorporated the affirmative defenses to wage discrimination claims under the Equal Pay Act into Title VII. 42 U.S.C. §200e-2(h) (1988); *see also County of Washington v. Gunther*, 452 U.S. 161 (1981).

[5] The district court had not expressly found that Respondent had made out a *prima facie* case; rather, the district court prefaced its discussion of the EPA defenses by stating, "even if the court were to assume that the plaintiff can make out a *prima facie* case under the EPA."

The Second Circuit affirmed the district court's dismissal of respondent's Title VII, claims noting that Respondent had come forward with no evidence of intentional discrimination or disparate impact. Opinion at 15a-17a. In discussing the former, the court recognized that the school district "believed it could not increase [respondent's] salary to the custodian rate without violating New York civil service law because she did not score in the top three on the civil service examination." Opinion at 17a. The court also dismissed respondent's Title VII retaliation claim.

Judge Pratt's concurring opinion, while agreeing with the majority's articulation of a new standard, pointed out that the school district was obligated to follow the New York State Civil Service System, and that it was "almost unthinkable" that on remand the district court would find that the custodian and cleaner classifications were not "job-related".

REASONS FOR GRANTING THE WRIT

I. The decision of the Second Circuit is in direct conflict with the decision of the Eighth Circuit *en banc* in *Strecker v. Grand Forks County Social Service Board.*

As acknowledged by the Second Circuit in its opinion, its decision is directly contrary to that reached by the Court of Appeals for the Eighth Circuit in *Strecker v. Grand Forks County Social Service Board*, 640 F.2d 96 (CA8 1980), adopted *en banc*, 640 F.2d 96, 109 (CA8 1981).[5] This inconsistency is not a matter of fact, nor is it one of degree; rather, the direct conflict is on the legal issue of the proper allocation of the burden of proof under the Equal Pay Act's "any other factor other than sex" defense, when that defense is based on a civil service classification system. It is a conflict which should be resolved by this Court.

In *Strecker* the plaintiff had been employed by a county social service board, and filed suit under the Equal Pay Act and Title VII when, after she voluntarily left her position, her male successor was paid substantially more money than she had received. The district court denied relief, and she appealed to the Eighth Circuit.

After reviewing the basic elements and burdens of proof under the EPA, the court noted that Mrs. Strecker's personnel classification had been made by a state personnel board ("Central Personnel"), and that her employer could only suggest changes in classification.

[5] The Second Circuit's decision also is very much in tension with *Riordan v. Kempiners*, 831 F.2d 690 (CA7 1987). In *Riordan* Judge Posner recognized that the pay disparity between the female plaintiff and certain male employees "reflected the operation of Illinois' civil service rules." *Id.* at 699. Thus, the discrepancy was not due to her sex. *Id.* (*citing Strecker*).

The court then noted that the state system classified both *positions* and *persons*, and set salaries according to both. *Positions* were classified by the responsibilities and duties required; *Persons* were classified according to each individual's related experience and education. Although generally the minimum and maximum salary for both the position and the person coincided, the system did allow for mismatching; in those instances, the individual's salary is determined by his or her *personal* classification, not the classification of the position.

At trial Mrs. Strecker presented no evidence that the objective, neutral criteria of the Central Personnel classification system had not been applied, and the appeals court determined that the requirements of that system were a factor other than sex, and thus a defense under the EPA. The court noted,

> "On the record it is difficult to understand what more [the defendants] could do to help Strecker. It is obvious that Central Personnel controlled her advancement, not [the defendants].

640 F.2d at 103.

Judge Heaney, in dissent, summarized the majority's holding as follows: "the defendants sustained their burden by proving that the pay differential was justified by the state's personnel classification system. It is apparent from the record, however, that the defendants did nothing more than establish the existence of that system." *Id.* at 104. Judge Heaney would have required the defendants to prove that the classification system's requirements were reasonably related to the jobs to be performed, and to prove that the plaintiff did not have the qualifications necessary to justify classifying her at a higher grade. *Id.*

Both *Strecker* and this case involve a civil service system which classified certain positions, and determined the individuals who could fill those positions. Both involve a situation where the employer itself could not change an employee's classification, or raise an individual's salary, on its own. In *Strecker*, proof of the existence of the civil service system was itself enough to meet the employer's burden of proof on the affirmative defense of "a differential based on any other factor than sex"; in this case, the Second Circuit has held that such a showing *does not* satisfy the employer's burden of proof on that defense. The conflict between decisions of these two Federal Courts of Appeals is clear, and should be resolved by this Court.

II. The Second Circuit's Requirement that the "other factor other than sex" be business-related conflicts with the standard applied by the Seventh Circuit.

The new job relatedness standard articulated by the Second Circuit is in direct conflict with the standard in effect in the Seventh Circuit. In *Fallon v. State of Illinois*, 882 F.2d 1206, 1211 (CA7 1989), the Seventh Circuit stated:

> "This circuit . . . does not require that the factor other than sex defense be related to the requirements of the particular position in question, or that it be a business-related reason[ ]."

(quoting *Covington v. Southern Illinois University*, 816 F2d 317, 321, 322 (7th Cir.), *cert. denied*, 484 U.S. 848 (1987). *See also Covington, supra; Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261-62 (CA7 1985); *Ende v. Board of Regents of Regency Univs.*, 757 F.2d 176 (CA7 1985). This standard is directly at odds with the Second Circuit's requirement that "an employer

bears the burden of proving that a bona fide business related reason exists for using the gender neutral factor that results in a wage differential in order to establish the other than sex defense." Opinion at 12a. In addition, the Second Circuit required that the employer prove that the examination and the practice of filling the custodian's position from the top three scorers "are related to performance of the custodian's job."[7] Opinion at 14a.

The conflict between the two circuits could not be more clear, and goes to the heart of the "factor other than sex" defense. Further, the conflict is, in essence, over the extent to which the federal courts will "second guess" employers and state civil service administrators in their employment and promotion practices. *See County of Washington v. Gunther*, 452 U.S. 161, 171 (1981) ("under the Equal Pay Act, the courts and administrative agencies are not permitted to 'substitute their judgment for the judgment of the employer.' ") By shifting the burden as it has, the Second Circuit has increased the obligations of employers in a way never intended by Congress. For these reasons, this conflict as well must be resolved by this Court.

[7] The Eleventh Circuit also has weighed in on this issue, expressly rejecting the Seventh Circuit's holding in *Covington* in *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (CA11) *cert. denied*, 488 U.S. 948 (1988) (Justice Brennan and Justice White would grant certiorari), in part based on its conclusion that the Seventh Circuit "ignored congressional intent as to what is a "factor other than sex." Other courts which have articulated a "relatedness" requirement, at least under the facts presented in particular cases, include the Ninth Circuit, *Maxwell v. City of Tuscon*, 803 F.2d 444 (CA9 1986); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (CA9 1982), and the Sixth Circuit, *E.E.O.C. v. J.C. Penny Co., Inc.*, 843 F.2d 249 (CA6 1988).

III. The Questions Presented are of Great Importance to School Districts and Other Municipal Employers.

The first question presented by this petition appears, on its face, to be limited, but the allocation of the burden of proof on this issue is of direct and significant importance to every school district, and every government employer, across the country. Simply stated, the new standard articulated by the Second Circuit in this case creates unnecessary and unwelcome uncertainty for *any* state or municipal employer whose hiring and promotion practices are governed by state civil service laws. Rather than being able to rely on the job classifications, and the competitive examination or other requirements established pursuant to state law, school districts and other municipal employers faced with suits under the EPA now must *prove* that the particular civil service examination and job classification system is related to the performance of the particular job at issue.

Even worse, under the rationale put forward by the Second Circuit, every municipal employer must perform an individual analysis of the relevant civil service classifications each time a person is hired so as to satisfy itself that the civil service requirements are sufficiently related to the particular position. This raises the spectre of what would happen if the employer determines that the classification and its requirements are not related. The possibility that a school district would face a choice between liability under the Equal Pay Act, and liability for failure to follow state civil service laws,[8] points out just how incorrect the Second Circuit's standard is.

[8] Section 95 of New York's Civil Service Law provides for a cause of action against any public officer who pays a person who has not been properly appointed to a position. N.Y. Civ. Serv. L. §95. Further, Section 100 of the Civil Service Law states that upon a complaint the Civil Service Commission can freeze or refuse to certify a school district's payroll. N.Y. Civ. Serv. L. §100.

Applying the Second Circuit's analysis to this case, the School District must prove that the content of the examination administered by the civil service commission to individuals wishing to apply to be custodians is related to the position, and that the practice of selecting from the top three scorers on the examination is similarly related. One must wonder how this burden is to be met. Is it up to the District Court, or to a jury, to determine that the examination is job-related? Will the school district be required to put on expert witnesses to testify to job-relatedness? Or perhaps the person who prepared the test must give testimony concerning its relatedness to the job? A similar litany of questions is presented by the need to prove that selection of one individual from the top three scorers is job related, except that these questions will go to the intent of the state legislature. Clearly Congress did not intend to put such a burden on employers when it included this broad defense in the Equal Pay Act.

This burden will exist despite the fact that the school district (at least in New York State) has no control over: (1) the content of the exam; (2) the job classification at issue; or (3) the requirements for promotion. Now school districts, if they are to avoid the costs of having to defend possible EPA discrimination suits, must engage in their own analysis of job classifications and competitive exams, since the new rule decreed by the Second Circuit no longer allows reliance on civil service laws or the determinations made by the government officials charged with the responsibility of interpreting those laws. The Second Circuit has directly imposed this substantial burden on school districts within its boundaries, and created uncertainty for school districts and municipal employers over the rest of the country.

Because of this uncertainty, the huge number of employees and employers affected by this ruling, and the importance of this issue to those employers, review of this issue by this Court is warranted.

In addition to the burdens established by the substance of this new standard, the Second Circuit's rewriting of the statute means that cases which properly would be decided on summary judgment now likely must proceed to trial. As this Court has emphasized, summary judgment is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The increased costs for municipal employers, and the increased workload for the federal courts, are important additional reasons why review should be granted.[9] Moreover, any new rule of law or proof which *increases* the workload of the federal courts should be very carefully considered.

In addition, the second and third questions presented are of importance to every employer subject to the Equal Pay Act. Under the Second Circuit's standard, an employer who relies on a facially neutral, non-business related basis for the differential in salary now must affirmatively prove that it is not discriminating. Under the Seventh Circuit standard, the *plaintiff* will have the burden of showing that the facially neutral, non-business related reason is a pretext for discrimination. This allocation of the burden of proof is tremendously

[9] As can be seen in the District Court's statement of facts, see *supra*, at pp. 7-8, petitioner already has been through a long process of administrative proceedings. The Second Circuit will only prolong this process, to the detriment of petitioner, and ultimately to the detriment of the students at the Randolph Central Schools. Randolph would much rather hire additional teachers than pay the costs of protracted litigation.

important in employment discrimination litigation, and in a basic way affects the freedom of employers to make employment and promotion decisions based on their own, non-discriminatory criteria rather than being constrained by what a court feels amounts to "business" related reasons. For this reason as well the Court should review these issues.

IV. Additional Factors in Favor of Review.

A. The decision of the Second Circuit ignored the plain language of the statute.

Although this Court does not grant review simply to correct an erroneous decision below, the fact that the Second Circuit incorrectly interpreted the Equal Pay Act is an additional factor to be considered in favor of review. Rather than giving the statutory language, "a differential based on any other factor other than sex," 29 U.S.C. §206(d)(1), its plain meaning, and recognizing that the school district was required to pay the respondent less than custodians because she had not scored sufficiently high on the civil service examination to qualify for that position, the Second Circuit engrafted an additional requirement onto the statute, so that it now reads, "a differential based on any other [business related] factor other than sex [which is materially relevant to the particular job]." Further, the Second Circuit justified its activism by selectively choosing snippets of legislative history, and relying on its own assessment of Congressional policy. Its view of the legislative history of the EPA, and especially of congressional intent, is markedly different than that made by this Court in *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981), which stated that "[u]nder the Equal Pay Act, the courts and administrative

agencies are not permitted to 'substitute their judgment for the judgment of the employer.' " (quoting 109 Cong. Rec. 9209 (1963)) (Statement of Rep. Goodell, principal exponent of the Act). The preservation of sound cannons of statutory construction, and reasoned consideration of the use and misuse of legislative history, make review here appropriate.

B. Guidance from the Court on the Equal Pay Act and its affirmative defenses would be welcome.

The Court has not directly addressed the provisions of the Equal Pay Act since its decisions in *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974), and *County of Washington v. Gunther, supra.*[10] In neither case did the Court rule directly on the proper interpretation or scope of the affirmative defenses. However, in both cases the Court recognized that the EPA did not impose the sorts of burdens on employers which the Second Circuit has imposed here. The Second Circuit's narrow view of the "any other factor other than sex" defense is in tension with these decisions, as well as with decisions of other Circuit courts, which have noted that the defense "was intended by Congress to be a 'broad general exception.' " *See, e.g., Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1261 (CA7 1985). General guidance to the federal courts on the meaning of the "any other factor other than sex" defense would be welcome, and would serve to clarify not only the proper scope of the defense under the EPA but under Title VII as well.

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[10] In *Gunther* the Court interpreted the Bennett Amendment, which incorporated the affirmative defenses of the Equal Pay Act into Title VII. *See* 42 U.S.C. §2000e-2(h). Thus, the proper interpretation of EPA defenses has application to Title VII litigation as well.

CONCLUSION

Each of the three questions presented in this petition presents a square conflict between the Second Circuit and one other Federal Appeals Court; the Eighth Circuit on question I, the Seventh Circuit on questions II and III. The issues presented are of great importance to school districts and to all other employers, and involve significant issues of statutory construction and the use of legislative history, as well as substantial questions of employment discrimination law. The consequences of the Second Circuit's addition of new requirements to the plain language of the statute will be to increase the potential liability of school districts, and to increase the burden on the federal courts. For all these reasons, and all those noted above, we respectfully submit that this petition should be granted, and that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: July 30, 1992

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 335—August Term, 1991

(Argued October 10, 1991 Decided May 5, 1992)

Docket No. 91-7566

Cora Aldrich,
Plaintiff-Appellant,

v.

Randolph Central School District and Cattaraugus County Civil Service Commission,
Defendants-Appellees.

Before OAKES, *Chief Judge,* NEWMAN and PRATT, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Western District of New York, Richard J. Arcara, *Judge.* granting defendants' motion for summary judgment on claims of sex-based wage discrimination in violation of the Equal Pay Act and Title VII of the Civil Rights Act of 1964 and retaliation in violation of Title VII.

Affirmed in part, reversed in part, and remanded.

Judge Pratt concurs in a separate opinion.

Cheryl Smith Fisher, Buffalo, NY (Magavern & Magavern of counsel), *for Plaintiff-Appellant.*

Anne S. Simet, Buffalo, NY (Hodgson, Russ, Andrews, Woods & Goodyear, of counsel), *for Defendant-Appellee Randolph Central School District.*

Dennis V. Tobolski, Little Valley, NY, *for Defendant-Appellee Cattaraugus County Civil Service Commission.*

OAKES, *Chief Judge:*

Cora Aldrich appeals from a judgment entered in the United States District Court for the Western District of New York, Richard J. Arcara, *Judge,* granting summary judgment for defendants Randolph Central School District and Cattaraugus County Civil Service Commission on her claims of sex-based wage discrimination in violation of the Equal Pay Act, 29 U.S.C. §206(d) (1988), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) (1988), and unlawful retaliation for filing a claim with the New York State Division of Human Rights in violation of 42 U.S.C. 2000e-3(a) (1988). The district court properly granted summary judgment on Aldrich's Title VII claims of sex-based wage discrimination and retaliation. We conclude, however, that the district court erred by holding that defendants' use of the civil service examination and classification system provides a defense to Aldrich's claim under the Equal Pay Act based on the existing record. Accordingly, we reverse in part and remand.

I.

The Randolph Central School District employs cleaners and custodians to maintain the two buildings used by the Randolph Central School System. In making employment decisions, Randolph must comply with local civil service laws administered by the Cattaraugus County Civil Service Commission. The commission establishes job classifications, administers civil service examinations, and prepares eligibility lists for civil service positions.

Cora Aldrich began working as a full-time cleaner in the Randolph Central School Distict's elementary school in September 1982. The cleaner position is a labor class position. As a result, Randolph may hire anyone it believes can learn to perform the duties of a cleaner in accordance with the job description developed by the commission. All of the cleaners who work in the Randolph Central schools are women.

Aldrich works alongside two male custodians. The custodian position is a competitive position under civil service rules. Applicants for the position must take a civil service examination. Their scores are ranked and placed on an eligibility list. Randolph may only hire custodians from among the top three applicants on the eligibility list. Men and women are equally eligible to apply for custodian and cleaner positions. Custodians are paid higher wages than cleaners.

Aldrich has taken the civil service examination for the custodian position and applied for custodian jobs several times. She has never scored in the top three on the examination and has never been offered a position as a custodian.

Soon after she began working as a full-time cleaner, Aldrich complained to her supervisor that she was essentially performing the same work as the custodian on staff at the elementary school. When the elementary school principal refused to reclassify her as a custodian, she filed an unsuccessful grievance contesting her classification. Aldrich then filed a job classification questionnaire with the Cattaraugus County Civil Service Commission in order to have her job duties reviewed.

In February 1985, following her unsuccessful appeal of the commission's determination that she was properly classified as a cleaner, Aldrich filed a complaint with the New York State Division of Human Rights ("NYSDHR") against defendants alleging sex-based wage discrimination because she was performing the work of the male custodians but was classified and paid as a cleaner. After an investigation, the NYSDHR dismissed the complaint.

In September 1985, Aldrich filed another complaint with the NYSDHR and the Equal Employment Opportunity Commission ("EEOC") alleging that Randolph retaliated against her for filing the February complaint when it did not ask her whether she wanted to work overtime on a weekend prior to the opening of school to clean up after a summer asbestos removal project. In July 1987, the NYSDHR dismissed the complaint. In July 1988, the EEOC issued a letter denying her charge and advising Aldrich of her right to sue.

In October 1988, Aldrich filed this action seeking relief against the Randolph Central School District and the Cattaraugus County Civil Service Commission under the Equal Pay Act and Title VII of the Civil Rights Act of 1964 for defendants' alleged sex-based wage

discrimination. Aldrich also alleged that Randolph retaliated against her in violation of Title VII for filing a complaint with the NYSDHR.

Upon completion of discovery, defendants moved for summary judgment. On May 8, 1991, the district court granted summary judgment for the defendants, finding as a matter of law that: (1) use of the civil service examination and classification system as a qualification for being hired and paid as a custodian is a complete defense to Aldrich's Title VII claim; (2) the pay differential between custodians and cleaners was based on a "factor other than sex" under the Equal Pay Act—the civil service examination and classification system; (3) plaintiff's failure to submit any additional proof beyond the allegations in her complaint mandated summary judgment on her retaliation claim. Aldrich appeals from this order and the judgment of the district court.

II.

Federal Rule of Civil Procedure 56(c) provides that the court shall grant summary judgment when the pleadings, evidence obtained through discovery, and affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must resolve all ambiguities and draw all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide. *See Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989). "Only when reasonable minds could not differ as to the import

of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 112 S.Ct 152 (1991). In resolving the issues raised on appeal from a grant of summary judgment, "we review the record *de novo* to determine whether there are genuine issues of material fact requiring a trial." *Id.*

III.

"What we seek is to insure, where men and women are doing the same job under the same working conditions that they will receive the same pay." 109 Cong. Rec. 9196 (1963) (statement of Rep. Frelinghuysen). In 1963, Congress enacted the Equal Pay Act ("EPA") to carry out this broad mandate. The Act prohibits employers from discriminating between employees on the basis of sex by paying higher wages to members of the opposite sex for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. §206(d)(1) (1988).

In order to prove a violation of the EPA, a plaintiff must first establish a prima facie case of wage discrimination by demonstrating that: (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort, and responsibility; (3) the jobs are performed under similar working conditions. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Once the plaintiff makes out a prima facie case, the burden shifts to the employer to justify the wage differential by proving that the disparity results from: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. §206(d)(1); *see also Corning*, 417 U.S. at 196.

The school district argues that the "burden under the Equal Pay Act was simply to show that a factor other than sex accounted for the pay differential. [Appellees] did that when they showed that a qualification for being appointed to the higher paying position was ranking third or higher on the examination."

In granting summary judgment for the defendants on Aldrich's EPA claim, the district court agreed with the school district and the commission, concluding that "[e]ven if the plaintiff could prove that she is being forced to perform the same duties as the male custodians, a proposition for which there is no support in the record, the simple fact is that the pay differential between custodians and cleaners is based on a factor other than sex, *i.e.*, the civil service examination."

Aldrich argues that the district court erred by holding that the civil service classification system is a factor-other-than-sex for purposes of the EPA and, therefore, a complete defense to the wage differential between Aldrich and her male counterparts.

We have not yet faced the question under what circumstances a civil service classification system qualifies as a factor-other-than-sex.

A.

We turn first to the distict court's conclusion that the civil service classification system followed by the Randolph Central School District provides a complete defense to the wage differential between Aldrich and the male custodians because the classification system is sex-neutral on its face and, therefore, is a factor-other-than-sex.

After tracing the evolution of the EPA through the legislative process, we believe that Congress specifically rejected blanket assertions of facially-neutral job classification systems as valid factor-other-than-sex defenses to EPA claims.

In 1963, the administration proposed legislation to prohibit wage differentials based on sex. H.R. 3861, 88th Cong., 1st. Sess., *reprinted in Equal Pay Act: Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 2-6 (1963). The Administration bill provided defenses to wage differentials based on sex only "where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." *Id.* at 3. The bill was referred to the Special Subcommittee on Labor of the House Committee on Education and Labor, which held hearings on the proposed legislation in March 1963. Industry representatives criticized the defenses provided in the bill, arguing that the exceptions for seniority and merit systems were too narrow and should include exceptions for a broader range of job classification systems. *Id.* at 99 (statement of W. Boyd Owen, Vice President of Personnel Administration, Owens-Illinois Glass Co.), 158-59, 171 (statement of William Miller, Vice President, Stewart Warner Corp., on behalf of the Chamber of Commerce of the United States).

In response to these and other criticisms from industry, Representative Goodell introduced new equal pay legislation which included the following defenses to wage differentials:

> (i) a seniority system; (ii) a merit system; (iii) *a job classification system;* (iv) a system which measures earnings by quantity or quality of production; (v) reasonable differentiation based on a factor or factors other than sex; or (vi) ascertainable and specific added costs resulting from employment of the opposite sex, or any combination of these exceptions.

H.R. 5605, 88th Cong., 1st Sess. (1963) (emphasis added). This new version was in large part adopted and reported out by the full House Committee on Education and Labor. However, the committee restructured the exceptions and, in doing so, did not include the blanket exception for job classification systems. Instead, H.R. 6060 provided the four affirmative defenses available under current law, including the catch-all factor-other-than-sex defense. H.R. 6060, 88th Cong., 1st Sess., *reprinted in* 109 Cong. Rec. 9211 (1963).

In the report accompanying H.R. 6060, the committee did not directly address why the precise language of H.R. 5605 was not adopted. The committee did explain, however, the role envisioned for job classification systems:

> The bill (H.R. 6060) refers to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
>
> This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a *majority* of the job classification systems. Thus, it is anticipated that a *bona fide* job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination.

H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963) (emphasis added), *reprinted in* 1963 U.S.C.C.A.N. 687, 688-89. By this report language, Congress indicated its intention

that only a "*bona fide* job classification program" where job-related distinctions underlie the classifications will qualify as a "valid defense to a charge of discrimination."

Based on this statutory history, we conclude that employers cannot meet their burden of proving that a factor-other-than-sex is responsible for a wage differential by asserting use of a gender-neutral classification system without more. Rather, Congress intended for a job classification system to serve as a factor-other-than-sex defense to sex-based wage discrimination claims only when the employer proves that the job classification system resulting in differential pay is rooted in legitimate business-related differences in work responsibilities and qualifications for the particular positions at issue. *See* Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 Colum. L. Rev. 1085, 1095-99 (1989); *see also Corning*, 417 U.S. at 198-201.

This understanding that job classification systems may qualify under the factor-other-than-sex defense only when they are based on legitimate business-related considerations also comports with the general policy goals Congress sought to effectuate by enacting equal pay legislation. Without a job-relatedness requirement, the factor-other-than-sex defense would provide a gaping loophole in the statute through which many pretexts for discrimination would be sanctioned. Surely Congress did not intend that an employee would lose an EPA claim after making out a prima facie case of wage discrimination simply because, for example, the employer chooses to call one employee a cleaner and another employee a custodian. Representative Frelinghuysen

discussed the distinction between bona fide and non-bona fide job classification systems on the House floor during the debate preceding passage of the Equal Pay Act:

> The inequities which this legislation seeks to correct are apparent to us all . . . As [an] example, the [job] classification names may not match—there would be male packagers and female selectors, nonetheless the work the two groups perform is identical in every respect. This . . . would be a violation if the men as a group received more pay than the women. On the other hand, the male packagers may be required to lift the heavy crates off the assembly line and place them on dollies or do various jobs requiring additional physical effort. The women selectors may work on the assembly line, selecting small items, for example, and placing them in crates. This would be a significant difference which would justify a difference in pay.

109 Cong. Rec. 9196 (1963).

Other circuits considering the proper analysis of the factor-other-than-sex defense under the EPA have required employers to prove that a legitimate business reason supports use of the factor. For example, in *Maxwell v. City of Tucson*, 803 F.2d 444, 447-48 (9th Cir. 1986), the Ninth Circuit upheld a district court finding that the City of Tucson failed to meet its burden where it classified a woman directing a municipal program at a lower salary level than her male predecessor. The court held that the city failed to demonstrate that the reclassification of the position to the lower level was based on a real change in duties and responsibilities. In doing so, the court explained that "[the factor-other-than-sex] defense enables the employer to determine *legitimate* organizational needs and accomplish *necessary*

organizational changes." *Id.* at 447 (emphasis added).[1] In cases involving the Bennett Amendment to Title VII,[2] courts have required employers to provide a legitimate business reason for the purported factor-other-than-sex. *See EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) ("[t]he factor other than sex defense does not include literally *any* other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (9th Cir. 1982) ("The Equal Pay Act concerns business practices. It would be nonsensical to sanction the use of a factor that rests on some consideration unrelated to business. An employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason.").

For these reasons, we hold that an employer bears the burden of proving that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential in order to establish the factor-other-than-sex defense. Additionally, we note that the plaintiff may counter the defendant's affirmative

[1] We disagree with the Eighth Circuit which held *en banc* that an employer satisifies the burden of proving the factor-other-than-sex defense simply by showing that a job classification system operates in gender-neutral manner without any further proof that the classifications are bona fide. *Strecker v. Grand Forks City Social Services Bd.*, 640 F.2d 96, 100-03 (8th Cir. 1980), adopted *en banc*, 640 F.2d at 109 (8th Cir. 1981). Instead, we agree with Judge Heaney's dissenting opinion in that case. *Id.* at 104 ("[A] governmental unit can specify the education and experience that an employee must have, so long as the requirements are reasonably related to the job to be filled and are not used as a pretext to avoid paying women equal pay for substantially equal work.").

[2] The Bennett Amendment incorporated the affirmative defenses to wage discrimination claims under the Equal Pay Act into Title VII. 42 U.S.C. §2000e-2(h) (1988); *see also County of Washington v. Gunther*, 452 U.S. 161 (1981).

defense by offering evidence showing that the reasons sought to be proved are a pretext for sex discrimination. *See Kouba*, 691 F.2d at 876. "The appropriate inquiry to determine if the factor put forward is a pretext, is whether the employer has 'use[d] the factor reasonably in light of the employer's stated purpose as well as its other practices.' " *Maxwell*, 803 F.2d at 446 (quoting *Kouba*, 691 F.2d at 876-77).

Accordingly, we believe the district court erred in its interpretation of the EPA. The district court held incorrectly as a matter of law that the defendants satisfied their burden of proving the factor-other-than-sex defense by relying on use of the facially neutral civil service examination and classification system because it was literally *a* factor other than sex. As discussed below, the district court should have further required the school district to prove that the job classification system has some grounding in legitimate business considerations.

B.

Applying the proper legal standard for the factor-other-than-sex defense, we believe that Aldrich's claim survives a motion for summary judgment.

At the outset, we believe that Aldrich raises a genuine factual issue on the question whether she performs the same work as the male custodians. The affidavit of her supervisor appears to refute the school district's claim that custodians perform qualitatively different work than cleaners. For example, the school district relies on the affidavit of the former superintendent of the Randolph Central School District in which he states that custodians maintain the boilers—a job "for which formal training is required." Aldrich's supervisor claims,

however, that Aldrich has performed some of the same maintenance operations on the boilers as the custodians and, further, that he himself has never attended "boiler school" in order to fulfill these responsibilities. In addition, the former superintendent stated that custodians make repairs on the plumbing; but Aldrich's supervisor stated that Aldrich helps him perform the plumbing repairs. We certainly think that on these facts a reasonable jury could determine that Aldrich performs equal work to the custodians.

We next consider whether the Randolph Central School District and the Cattaraugus County Civil Service Commission can offer use of the civil service examination and classification system as a valid factor-other-than-sex defense.

In our view, use of the civil service examination and the job classification system keyed to examination results can provide a valid factor-other-than-sex defense if defendants prove that the system is bona fide. Specifically, the school district must prove that the exam for custodians and the practice of filling the custodian's position only from among the top three scorers on the exam are related to performance of the custodian's job. If Aldrich were pursuing only a Title VII claim, the school district would not have to establish the job-relatedness of the custodian's exam unless the plaintiff first showed that the exam had a disparate impact. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). But on her Equal Pay Act claim, Aldrich has already made a showing, sufficient to defeat the school district's motion for summary judgment, that she is doing custodian's work and being paid less than the male custodians. If she sustains her burden on that aspect of her Equal Pay Act claim, then she need not make any further showing

that the custodian's exam is adversely affecting her because of her gender since the school district asserts the exam results as the basis for the wage differential. Once she shows that she is being paid less than men for doing the same work, the employer can rely on an exam to justify that wage differential only if the employer proves that the exam is job-related.

Since factual issues remain to be resolved with respect to the Equal Pay Act claim, we believe summary judgment was improperly granted. Accordingly, we reverse the district court's dismissal of Aldrich's claim of sex-based wage discrimination under the Equal Pay Act. On remand, the district court might wish to consider the advisability of bifurcating the issues and trying first the issue of whether Aldrich is performing custodian's work.

IV.

Aldrich also appeals from the granting of defendants' summary judgment motion on her Title VII claim of sex-based wage discrimination. 42 U.S.C. §2000e-2(a)(1) (1988).[3] Because Aldrich failed to provide sufficient evidence to support her claim of sex-based wage discrimination under Title VII, we think her claim was properly dismissed.[4]

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[3] 42 U.S.C. §2000e-2(a)(1) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex.

[4] We do not agree, however, with the district court's conclusion that our decision in *Members of Bridgeport Hous. Auth. Police Force v. City of Bridgeport*, 646 F.2d 55 (2d Cir.), *cert. denied*, 454 U.S. 897 (1981) requires dismissal of Aldrich's Title VII claim. In *Bridgeport*, we concluded that reliance on a *job-related* civil service examination

(Footnote continued on following page.)

In order to establish a valid claim under Title VII for sex-based wage discrimination, a plaintiff can demonstrate a disparate impact from use of a facially neutral employment practice, *see, e.g. E.E.O.C. v. J.C. Penney Co., Inc.*, 843 F.2d 249 (6th Cir. 1988), or present evidence of intentional sex-based wage discrimination. *See County of Washington v. Gunther*, 452 U.S. 161, 178-81 (1981). Aldrich does not offer sufficient evidence which would satisfy either theory of liability.

As the district court correctly noted:

> [Aldrich] has not presented any evidence that the civil service examination for custodian had a significantly discriminatory impact on women. Nor has she provided any statistical data that could be used to determine whether the examination was discriminatory, *i.e.*, how many people took the exam, how many were women, how many women passed, how many women were in the top three and how many women were hired.

Aldrich also fails to offer evidence that the job classification system which is keyed to the examination has a disparate impact on women.

Furthermore, the record contains no evidence of intent to discriminate against women on the part of the school district or the civil service commission by maintaining Aldrich's classification as a cleaner and paying her at the cleaner wage rate. The civil service commission, following a request from Aldrich for reevaluation of her

(Footnote continued from preceding page.)

as a qualification for hiring into a police department provides a complete defense to a Title VII claim. The job-relatedness of the civil service examination at issue in this case has not been established. However, because Aldrich has not made out a prima facie case of sex-based wage discrimination under Title VII, summary judgment was proper notwithstanding the open factual question regarding the job-relatedness of the civil service examination.

classification, conducted a review of her duties and concluded that she was properly classified as a cleaner.[5] Randolph believed it could not increase Aldrich's salary to the custodian rate without violating New York civil service law because she did not score in the top three on the civil service examination.

Without evidence of a disparate impact on women from use of the civil service examination and classification system or intentional discrimination, Aldrich's Title VII claim cannot survive a motion for summary judgment.

V.

Aldrich also appeals the granting of summary judgment on her claim that the school district retaliated against her in violation of Title VII. 42 U.S.C. §2000e-3(a) (1988). In her complaint, Aldrich alleges that in late August 1985, the school district retaliated against her for filing a charge of sex discrimination with the New York State Division of Human Rights because the school district did not ask her whether she wanted to work overtime over a weekend to clean up after asbestos removal.

The school district supported its motion with the affidavit of the Superintendent of Schools for Randolph County during 1985. The superintendent indicated in the affidavit that he asked the head custodian at the high school to ask only the custodial staff whether they wanted to work overtime because he was not aware that cleaners were trained to operate the waxing and buffing

[5] We note that this evaluation by the civil service commission would be admissible but not dispositive on the issue whether she actually performs equal work to her male custodian counterparts under the Equal Pay Act.

machines required for the job. Furthermore, he claims that he would have asked Aldrich to perform the work if he had known she was trained to operate such equipment. By submitting this affidavit, defendant offered a "legitimate non-discriminatory reason for the alleged mistreatment." *DeCintio v. Westchester County Medical Ctr.*, 821 F.2d 111, 115 (2d Cir.), *cert. denied*, 484 U.S. 956 (1987).

The district court properly granted summary judgment given that Aldrich responded to defendant's motion with only the conclusory allegations contained in her complaint. Without more, summary judgment on Aldrich's retaliation claim was compelled. *See* Fed. R. Civ. P. 56(e); *see also Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), *cert. denied*, 112 S. Ct. 152 (1991).

VI.

For the foregoing reasons, the judgment of the district court granting summary judgment for defendants Randolph Central School District and Cattaraugus County Civil Service Commission on plaintiff Aldrich's claims of sex-based wage discrimination in violation of the Equal Pay Act is reversed. In addition, the judgment of the district court granting summary judgment for defendant Randolph Central School District on plaintiff Aldrich's Title VII claims of sex-based wage discrimination and retaliation are affirmed. Accordingly, we remand this case to the district court.

Aldrich v. Randolph Central School District
No. 91-7566

PRATT, *Circuit Judge*, concurring.

I concur in all three holdings of Chief Judge Oakes' opinion: (1) that the district court properly granted summary judgment for the school district on Aldrich's Title VII claim of sex-based wage discrimination; (2) that summary judgment dismissing Aldrich's retaliation claim was proper; and (3) that there is a triable issue defeating summary judgment on Aldrich's claim under the Equal Pay Act. I write only to focus a little more closely on the Equal Pay Act ruling.

As noted in the opinion, Aldrich's claim under the Equal Pay Act is that, as a lower-paid cleaner, she was assigned and performed the same duties as the higher-paid, male, civil service-qualified custodians, and that under the Equal Pay Act this entitled her to recover the differential.

While the school district is entitled to raise the "any other factor other than sex" defense of reliance on the civil service classification system, it must, as the opinion points out, show that the examination-based system and the district's reliance upon it is job-related and bona fide.

As correctly noted in the opinion, "Aldrich raises a genuine factual issue on the question whether she performs the same work as the male custodians", *ante* at 13; this determination requires reversal of the summary judgment. Much of the opinion, however, is taken up with a discussion of the need for the school district to go further than simply asserting its reliance upon the civil service examination and classification system. The opinion stresses the need for the school district to establish as a condition for its "any other factor other

than sex" defense that this state-controlled job classification and hiring system is job-related. I have no quarrel with this concept, but am both perplexed at the need for stressing it in the context of this case, and concerned lest it distract the parties and the district court from the heart of this particular dispute.

Under the New York State civil service system, jobs are classified into various categories, examinations are periodically given for each of the classifications, and appointments may be made from any of the three highest-scoring available applicants. *See*, N.Y. Civ. Serv. Law §61 (McKinney Supp. 1992). Municipalities such as the Randolph Central School District are required by law to hire and promote from the civil service lists. *See generally*, N.Y. Civ. Serv. Law §20 (McKinney Supp. 1992). Moreover, the Civil Service Commission goes to great lengths to see that its examinations are job-related. *See* Cattaraugus County Civil Service Commission, *Local Administration of the New York State Civil Service Law* (March 1991). On request, it will analyze a particular position, as it did here, to see if it falls within the classification assigned to it by the governmental employer. It is thus almost unthinkable that on remand, after a reexamination of the civil service's custodian and cleaner classifications, the district court could possibly conclude that these classifications were not "job-related".

As I view this case, the crux of Aldrich's appeal is not the underlying validity or job-relatedness of the civil service examinations and hiring procedures, because those aspects of the system are not in dispute. Instead, the controversy focuses on the actual practices of the school district in assigning work to Aldrich, as a cleaner, and to her male co-employees, as custodians.

On the remand, when it applies the "any other factor other than sex" defense to the unique problems of this case, the district court must inevitably determine whether in assigning the work the school district actually followed the civil service classifications of "custodian" and "cleaner". If it did not, and instead had Aldrich doing the same work as the higher-paid custodians, then the civil service classification system, as applied to Aldrich in this case, was not bona fide and job-related, and the district's defense would fail.

Decision, Order and Judgment of the United States District Court for the Western District of New York.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Civ. 88-1073A

CORA ALDRICH,

Plaintiff,

v.

RANDOLPH CENTRAL SCHOOL DISTRICT and CATTARAUGUS COUNTY CIVIL SERVICE COMMISSION,

Defendants.

DECISION AND ORDER

INTRODUCTION

On October 5, 1988, the plaintiff, Cora Aldrich, filed this action seeking relief under the Equal Pay Act, 29 U.S.C. §206(d) ("EPA"), and the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000(e) *et seq.* ("Title VII"), for defendants' allegedly discriminatory actions against her based on her sex. More specifically, plaintiff, who is employed as a cleaner by defendant Randolph Central School District ("Randolph"), alleges that she is being paid less than male custodians solely because of her sex.

Plaintiff also alleges that Randolph retaliated against her, in violation of Title VII, 42 U.S.C. §2000e-3(a), for filing a complaint with the New York State Division of Human Rights ("NYSDHR") and the Equal Employment Opportunity Commission ("EEOC"). She alleges that she was denied an opportunity to work overtime in retaliation for the charges she filed with the NYSDHR and the EEOC. Defendant Cattaraugus County Civil Service Commission (the "Commission") administers the New York Civil Service law in Cattaraugus County where Randolph is located.

The defendants have moved for summary judgment pursuant to Fed. R. Civ. P. 56. Defendants argue that plaintiff cannot be hired or paid the same as a custodian under New York State Civil Service Law because she has not scored in the top three on the civil service examination for the custodian position. Defendants also argue that plaintiff's EPA and Title VII claims are time barred. Finally, Randolph argues that plaintiff's retaliation claim should be dismissed due to plaintiff's failure to establish a *prima facie* case of retaliation.

The parties submitted briefs in support of their respective positions and oral argument was held on March 8, 1991. After reviewing the submissions of the parties and hearing argument from counsel, the Court grants defendants' motion for summary judgment.

STATEMENT OF FACTS

The plaintiff was hired as a part-time cleaner by Randolph in February, 1982. In September, 1982, plaintiff, at her request, was given a position as a full-time cleaner. Randolph employs numerous civil service employees, including cleaners and custodians. The Commission is responsible for making job classification

determinations pursuant to New York's Civil Service Law and local civil service rules and regulations. Its job descriptions are utilized by Randolph.

The cleaner position is a labor class position. *See* N.Y. Civ. Serv. L. §43. In other words, when filling the cleaner position, Randolph may hire anyone it believes can learn to perform the duties of a cleaner in accordance with the job description developed by the Commission.

The position of custodian, on the other hand, is a competitive position. *See* N.Y. Civ. Serv. L. §44. Therefore, under the New York Civil Service Law, applicants for the custodian position must take a civil service examination. *See* N.Y. Civ. Serv. L. §50. Applicants are then ranked according to their test scores and placed on an eligibility list. Randolph may only hire custodians form among the top three applicants on the eligibility list. *See* N.Y. Civ. Serv. L. §61. As applicants are chosen to fill custodian positions, the remaining applicants move up the list. The eligibility list stays in effect for a fixed period of time. *See* N.Y. Civ. Serv. L. §56. At the end of that period, a new examination is given and a new eligibility list is established. Both the position of custodian and cleaner are open to both sexes and compensation for both positions is determined by the collective bargaining process. All of the custodians currently employed by Randolph have been selected pursuant to the New York Civil Service Law.

The plaintiff alleges that she performs the same duties as those employed by Randolph as custodians and, therefore, she should be paid the same wage. She alleges that the only reason she is not paid the same wage as the custodians is because of her sex. It is undisputed, however, that the plaintiff took the civil service

examination for the position of custodian prior to being hired as a cleaner and several times thereafter, and has never been ranked among the top three applicants on the eligibility list.

There is some overlap between the duties performed by cleaners and those performed by custodians. The key difference, however, is that custodians are required to be able to perform a variety of maintenance and repair tasks which are not required of cleaners.

The plaintiff first questioned her job classification as a cleaner in February, 1983. She later contested the classification by filing a grievance on or about May 2, 1983. In the grievance, she stated that she was misclassified on September 15, 1982. The grievance was denied on the merits and also on the ground that it was not timely submitted pursuant to the collective bargaining agreement. Plaintiff appealed the grievance decision to the Superintendent of Schools and then to the Board of Education but the grievance was denied at each step.

The plaintiff then submitted her grievance to binding arbitration. On December 5, 1983, the arbitrator issued an Opinion and Award wherein he denied the grievance as untimely filed.

On February 2, 1984, plaintiff filed a job classification questionnaire with the Commission in order to have her actual job duties reviewed for classification purposes. The Commission reviewed her job duties and, on April 4, 1984, issued a Determination wherein it found that the cleaner classification accurately described plaintiff's duties.

On or about April 16, 1984, plaintiff filed an appeal of the Commission's Determination. A hearing was held before a panel of three members of the Commission. On June 6, 1984, the panel issued a decision finding that plaintiff was properly classified as a cleaner and directing that additional typical work activities be enumerated in a revised job description in order to more clearly describe the duties of a cleaner.

On or about February 13, 1985, plaintiff filed complaints with the NYSDHR against the defendants alleging sex discrimination on the ground that she was classified and paid as a cleaner rather than a custodian. The NYSDHR conducted an investigation and, on July 21, 1987, issued Determinations and Orders of no probable cause and dismissed the complaints.

On or about September 20, 1985, plaintiff filed another complaint with the NYSDHR wherein she alleged that Randolph retaliated against her for filing the first complaint when it did not ask her to perform overtime work on one occasion prior to the opening of school. Randolph answered the complaint by explaining that none of the cleaners were asked to work overtime that day. On July 21, 1987, the NYSDHR issued a Determination and Order of no probable cause and dismissed the retaliation complaint.

On or about July 5, 1988, the EEOC issued Determinations and Orders of "no reasonable cause" and dismissed the complaints against the defendants. Plaintiff then filed this action against the defendants on October 5, 1988.

DISCUSSION

Summary Judgment Standard

The Second Circuit, in *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991), recently articulated the standard for summary judgment under Fed. R. Civ. P. 56:

> In assessing the record, all ambiguities and reasonable inferences are viewed in a light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Summary judgment is appropriately granted when there is no genuine issue as to any material fact and when, based upon facts not in dispute, the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only when reasonable minds could not defer to the import of the evidence is summary judgment proper. *See id.* at 250-51. Once the movant has established a *prima facie* case demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with enough evidence to support a jury verdict in its favor, and the motion will not be defeated merely upon a "metaphysical doubt" concerning the facts, *see Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), or on the basis of conjecture or surmise.

Id. at 982.

After applying this standard to the instant case, the Court finds that plaintiff has failed to produce enough evidence to support a jury verdict in her favor on any one of her three claims. Thus, there is no genuine issue of material fact and summary judgment in favor of the defendants is appropriate as a matter of law.

Title VII Claim

The plaintiff claims that the defendants discriminated against her on the basis of sex in violation of Title VII, 42 U.S.C. §2000e-(a)(1), by classifying and compensating her as a cleaner rather than a custodian. The Court disagrees.

Title VII outlaws sex discrimination in hiring. 42 U.S.C. §2000e-2(a)(1). "[Title VII] proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Title VII expressly holds harmless, however, an employer acting "upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. §2000e-2(h); *see Members of Bridgeport Housing Auth. Police Force v. City of Bridgeport*, 646 F.2d 55, 61 (2d Cir.), *cert. denied*, 454 U.S. 897 (1981). Title VII "not only permits valid tests but also specifically permits employers to apply different standards of compensation and other terms of employment pursuant to *bona fide* merit systems." *Members of Bridgeport Housing Auth. Police Force*, 646 F.2d at 61.

When challenging a facially neutral employment practice, such as the civil service examination at issue here, a plaintiff must make a *prima facie* showing that the practice "had a significantly discriminatory impact." *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). Where a *prima facie* case is established, "the employer must then demonstrate that any given requirement [has] a manifest relationship to the employment in question, in order to

avoid a finding of discrimination." *Id.* (citation omitted). Even where the employer is able to demonstrate job-relatedness, however, "the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* (citations omitted).

The Second Circuit case of *Members of Bridgeport Housing Auth. Police Force*, 646 F.2d 22 (2d Cir.), *cert. denied*, 454 U.S. 897 (1981), is very similar to the case at hand. In *Bridgeport*, members of the Housing Police, who were all black or hispanic, sued the City under Title VII claiming that they had been discriminated against because they received the same training and performed the same duties as the regular Bridgeport City Police Department, yet received pay and benefits significantly less than those received by the City Police. The City argued that the members of the Housing Police received less pay, not because of discrimination, "but solely because all members of the [City Police] had successfully completed the required civil service examination, whereas members of the Housing Police had not passed any qualifying examination." *Id.* at 59.

The Second Circuit, in reversing the district court's finding of discrimination, held that "the City's use of civil service examinations as a qualification for hiring into the regular Police Department provides a complete defense to the Title VII claim." *Id.* at 61. The court noted that the Housing Police had not challenged the validity the civil service examination or attacked the *bona fides* of the merit system for hiring into the City Police Department. *Id.* While *Bridgeport* dealt with race discrimination, the Court can see no reason why it would not also apply in a sex discrimination case.

In this case, all custodians hired by Randolph have ranked in the top three on the civil service eligibility list. Plaintiff admits that she has never ranked in the top three on the eligibility list despite repeated attempts. Thus, the plaintiff has never qualified for the position of custodian under the New York Civil Service Law.

Furthermore, plaintiff has not challenged the legitimacy of the civil service examination. She has not presented any evidence that the civil service examination for custodian had a significantly discriminatory impact upon women. Nor has she provided any statistical data that could be used to determine whether the examination was discriminatory, *i.e.*, how many people took the exam, how many were women, how many women passed, how many women were in the top three and how many women were hired.

Thus, the Court finds that the defendants' use of a civil service examination as a qualification for being hired as a custodian is a complete defense to plaintiff's Title VII claim and defendants are entitled to summary judgment as a matter of law. *Id.*; *see also Connecticut v. Teal*, 457 U.S. at 446.[1]

EPA Claim

Plaintiff claims that defendants discriminated against her on the basis of sex in violation of the EPA, 29 U.S.C. §206(d), by paying her less than the male custodians. The Court again disagrees.

The EPA prohibits employers from paying higher wages to men than women "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar

[1] In view of this holding, the Court need not decide whether plaintiff's Title VII claim is time barred.

working conditions . . ." 29 U.S.C. §206(d)(1). The plaintiff has the burden of proving that she was paid less than a man doing equal work. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). To state a *prima facie* case of discrimination under the EPA, a plaintiff must establish: (1) that different wages are paid to employees of the opposite sex; (2) that the employees do equal work which requires equal skill, effort and responsibility; and (3) that the employees have similar working conditions. *Id.*; *Forsberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 1409, 1404 (9th Cir. 1988) (sic). If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to show that the wage differential is justified under one of the four statutory exceptions: (1) a merit system; (2) a seniority system; (3) a system which measures quantity and quality of production; or (4) a differential based on any factor other than sex. 29 U.S.C. §206(d)(1)(i)-(iv); *see Corning Glass Works*, 417 U.S. at 196.

In this case, even if the Court were to assume that the plaintiff can make out a *prima facie* case under the EPA, the defendants cannot be found liable under the EPA because the pay differential between cleaners and custodians is based on a factor other than sex, *i.e.*, the civil service examination. The male custodians employed by Randolph receive higher wages than the predominately female cleaners because they have qualified for the position of custodian by scoring in the top three on the competitive civil service examination. The civil service examination is open to both sexes and is mandated by New York Civil Service Law. *See* N.Y. Civ. Serv. L. §50. Plaintiff has taken the examination on a number of occasions but has never ranked in the top

three on the eligibility list. Thus, she has never been eligible under the New York Civil Service Law to be classified or compensated as a custodian.

The plaintiff has not challenged the legitimacy of the civil service examination or the New York Civil Service Law. Even if the plaintiff could prove that she is being forced to perform the same duties as the male custodians, a proposition for which there is no support in the record, the simple fact is that the pay differential between custodians and cleaners is based on a factor other than sex, *i.e.*, the civil service examination. Thus, defendants are entitled to summary judgment as a matter of law.[2]

Retaliation Claim

The plaintiff claims that Randolph retaliated against her for filing a complaint with the NYSDHR, in violation of Title VII, 42 U.S.C. §2000e-3(a), when it failed to ask her to work overtime on August 30, 1985. The Court finds, however, that, even upon viewing the record in a light most favorable to the plaintiff, no reasonable jury could find in her favor on this claim. Thus, there is no genuine issue of material fact and Randolph is entitled to summary judgment as a matter of law.

The Second Circuit, in *DeCintio v. Westchester County Medical Center*, 821 F.2d 111 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987), articulated the requirements of a retaliation claim:

> To make out a *prima facie* case of retaliation under Title VII, [a plaintiff] must show: protected participation or opposition under Title VII known by the alleged retaliator; an employment action

[2] In view of this holding, the Court need not decide whether plaintiff's EPA claim is time barred.

> disadvantaging the person engaged in the specific activity; and a causal connection between the protected activity and the disadvantageous employment action. Proof of causal connection can be established *indirectly* by showing that the protected activity was followed closely by discriminatory treatment, or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or *directly* through evidence of retaliatory animus directed against a plaintiff by the defendant. Once a plaintiff has established a *prima facie* case, the employer must show a legitimate non-discriminatory reason for the alleged mistreatment. The employee is then afforded the opportunity to prove that the employer's proffered reason for its conduct is pretextual.

Id. at 115 (citations omitted) (emphasis in the original).

Fed. R. Civ. P. 56(e) states in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, conclusory allegations contained in a complaint, without more, cannot withstand a motion for summary judgment. Fed. R. Civ. P. 56(e). Once the party moving for summary judgment has established a *prima facie* case demonstrating the absence of a genuine issue of material fact, the burden is on the nonmoving party to come forward with enough evidence to support a jury verdict in its favor, and the motion cannot be defeated based upon conclusory allegations or conjecture. *Bryant*, 923 F.2d at 982.

In this case, Randolph has put forth the affidavit of Mr. Edmund Harvey, who was Superintendent of Schools for Randolph during 1985, in support of its motion for summary judgment on the retaliation claim. *See* Item 13, Defendant Randolph's Notice of Motion and Motion for Summary Judgment, Exhibit 7. In paragraph 18 of his affidavit, Mr. Harvey states that he asked the high school head custodian, Mr. John Van Name, to ask the custodial staff if they wanted to work overtime on August 30, 1985. The work entailed the use of heavy duty buffing and waxing machines which were generally operated by custodians and not cleaners. Mr. Van Name asked the custodians at the high school if they wanted to perform the work but they declined. He then asked the custodians at the elementary school if they wanted to do the work but they too declined. No cleaners were asked to perform the work because they did not normally operate the buffing and waxing machines. Indeed, Mr. Harvey affirmed that had he known the plaintiff had been trained to operate the heavy duty buffing machines and wanted to perform the work, he would have offered her the opportunity. Thus, the Court finds that Randolph has established a *prima facie* case that there is no genuine issue of material fact with regard to the retaliation claim and that it is entitled to summary judgment as a matter of law.

Plaintiff, on the other hand, has failed to put forth any proof of her retaliation claim. The Complaint merely asserts a conclusory allegation, based "[u]pon information and belief", that Randolph retaliated against her for the charges she filed with the NYSDHR. In her affidavit in opposition to the defendants' motion for summary judgment, the plaintiff does not even mention the retaliation claim. Nor has she offered any other proof

to contradict Mr. Harvey's affidavit with regard to the retaliation claim. Thus, the Court finds that Plaintiff has failed to meet her burden under Fed. R. Civ. P. 56(e) and Randolph is entitled to summary judgment on the retaliation claim.

CONCLUSION

For the reasons stated, the Court grants defendants' motion for summary judgment.

It is so ordered.

RICHARD J. ARCARA
Honorable Richard J. Arcara
United States District Judge

DATED: May 7, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CASE NUMBER: CIV-88-1073A

CORA ALDRICH

v.

RANDOLPH CENTRAL SCHOOL DISTRICT
and CATTARAUGUS COUNTY CIVIL
SERVICE COMMISSION

JUDGMENT IN A CIVIL CASE

INTRODUCTION

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] **Decision by Court.** This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is granted.

MICHAEL J. KAPLAN
Clerk

(Illegible)
(By) Deputy Clerk

May 8, 1991
Date